

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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GEORGE AIRDAY,

Plaintiff,

14 Civ. 8065

-against-

OPINION

THE CITY OF NEW YORK, KEITH SCHWAM, and
DAVID M. FRANKEL,

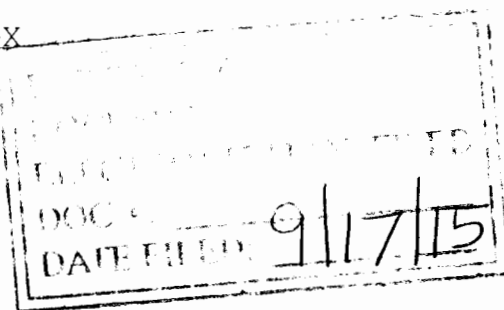
Defendants.

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Sweet, D.J.

Defendants the City of New York ("the City"), Keith Schwam ("Schwam") and David Frankel ("Frankel") (collectively, the "Defendants") have moved pursuant to Rule 12(b) of the Federal Rules of Civil Procedure to dismiss the Complaint of plaintiff George Airday ("Airday" or the "Plaintiff") alleging violations of 42 U.S.C. §§ 1983 and 1988, and the First, Fifth and Fourteenth Amendments of the United States Constitution. Plaintiff's claims arise out of the denial of renewal of his five-year term as New York City Marshall in alleged retaliation for his criticism of a parking violation enforcement program called the "Paylock Booting Program." Plaintiff alleges: (1) retaliation against him in violation of his First Amendment rights; (2) violation of his procedural and substantive due process rights; and (3) violation of his rights to equal protection. Based on the conclusions set forth below the motion is granted in part and denied in part.

Prior Proceedings

The Plaintiff filed his Complaint containing the following allegations. Airday was a City Marshal for 29 years

from January 1984 through December 2013. See Compl. ¶¶ 11-17.

A City Marshal is a public officer who operates his or her own business enforcing judgments and collecting fees upon execution of those judgments on behalf of judgment-creditors, who are his clients or customers. As a City Marshal, Airday satisfactorily performed his duties over the course of his career, and his five-year term of office was regularly renewed, consistent with the established practice of renewing the terms of the other City Marshals. Id. ¶¶ 11-15.

In 2010, Mayor Bloomberg and his Administration decided to take steps to "privatize" the City's system for collecting unpaid parking tickets by replacing City Marshals with a private company known as "Paylock." Id. ¶¶ 20-25. Under this program, which was to be run by the New York City Department of Finance ("DOF") under the authority of Frankel, as DOF Commissioner, City Marshals would no longer enforce judgments by towing scofflaw vehicles. Id. ¶ 25. Instead, private employees of a private company would affix a metal "boot" to a wheel of the scofflaw vehicle, and the owner would have to pay Paylock by credit card in order to release the boot. Id. The Paylock proposal was a significant threat to the established operations of at least twenty City Marshals,

including Airday, who focused significant portions of their operations on the DOF's existing Scofflaw Program. See id. ¶ 22. As a result, Airday and other City Marshals began investigating the propriety of the Paylock proposal, including the legality of a private and non-public no-bid contract as potentially violative of applicable competitive biddings laws. Id. ¶¶ 24, 32.

After reviewing the Paylock proposal at the office of DOF, Airday identified several serious issues, including: (a) how Paylock was chosen by the City and whether a no-bid contract was appropriate and legal; (b) who would be in charge under the proposal for tracking fines paid to Paylock; (c) who would be responsible for supervising Paylock; (d) what fees would be charged to the vehicle owners; (e) what would be the City Marshal's law enforcement and administrative roles, if any, in the booting process; (f) what would Paylock's fee be under the proposed system; (g) whether a vehicle could be legally "un-booted" upon payment of the outstanding fines and judgments and left operational on City streets where the vehicle's registration status had expired and the vehicle could not under law be parked or operated on public streets; and (h) whether it

was appropriate to omit or disregard necessary and legal guidelines from the Paylock booting program. Id. ¶ 36.

Airday disseminated his criticisms of the Paylock program to other City Marshals and to the Marshal's Association of the City of New York, Inc. (the "Marshal's Association"). Id. ¶ 37. The Marshal's Association is a not-for-profit corporation organized under the laws of New York for the benefit of City Marshals. See id. Airday also shared his criticisms with New York City's Department of Investigations ("DOI"), which had oversight responsibility for City Marshals and was supervised by Schwam. Id. ¶¶ 30, 37.

Schwam and Frankel purportedly punished Airday for voicing his criticism of Paylock, thereby sending a message to the other City Marshals not to oppose the Paylock proposal or expose any issues pertaining to it. Id. ¶ 38. On January 18, 2012, Airday was arrested for possession of a gun in violation of a protective order issued against him arising from what Airday contends was a false allegation of domestic violence by his former girlfriend. Id. ¶ 39. The next day, Schwam, in his capacity as DOF Director of the Marshal's Bureau, wrote Airday a letter demanding that he resign as a City Marshal and purporting

to unilaterally suspend Airday as a City Marshal. Id. ¶¶ 40-47. That same day, Frankel, acting as the DOI Commissioner, removed Airday from the DOF Scofflaw Program, thereby damaging and disrupting his business operations. Id. ¶ 47.

According to Airday, both Schwam and Frankel took these actions against Airday without a factual basis for believing that the criminal allegations against him were true and despite the fact that several other City Marshals have been accused of far more serious misconduct and were not similarly disciplined. Id. ¶¶ 46, 48.

The Paylock contract was signed by Frankel's office in February of 2012 in violation of the competitive bidding laws. Id. ¶¶ 51-52. Airday contends that the other City Marshals who were part of the Marshal's Association and directly affected by the Paylock program ceased their opposition the Paylock program. Id. Absent any opposition or a request for public debate on the issue, a public hearing before the City Council was dispensed with and the Paylock program entered into effect. Id. ¶¶ 53-55.

Six months after learning of the criminal charges against Airday, Schwam successfully petitioned the First and

Second Departments to temporarily suspend Airday. Id. ¶ 59. As a result, Airday was required to shut down his office entirely and terminate his employees. Id. ¶ 60. While other City Marshals had engaged in more serious misconduct, Airday was singled out for the harshest retribution because of his outspoken opposition to the Paylock program. Id. ¶¶ 46, 48, 59, 67.

Although Airday was fully exonerated later that year of the criminal charges against him, Schwam and Frankel maintained the DOF ban against him, the DOI's investigation into Airday's conduct, and disciplinary charges against him. Id. ¶¶ 61-67. In mid-2013, Airday agreed in good faith to settle those charges and was restored to office on June 5, 2013, but Schwam unilaterally inform Airday six months later that his term expired, that he would not be held over, and that he was no longer a City Marshal. Id. ¶ 68-71.

Schwam's actions were was taken shortly before Mayor Bloomberg was scheduled to leave office and Schwam was slated to leave his position at DOI to join a private Bloomberg company. Id. ¶ 76. Had Schwam not acted, Airday would have remained in office as a holdover City Marshal in accordance with the long-

established practice of continuing the offices of City Marshals after the expiration of their five-year terms of office. Id. ¶¶ 11-15.

The Applicable Standard

Under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A claim is facially plausible when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 663 (quoting Twombly, 550 U.S. at 556). In other words, the factual allegations must "possess enough heft to show that the pleader is entitled to relief." Twombly, 550 U.S. at 557 (internal quotation marks omitted).

Though the court must accept the factual allegations of a complaint as true, it is "not bound to accept as true a legal conclusion couched as a factual allegation." Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 555).

In considering a motion to dismiss, "a district court may consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint." DiFolco v. MSNBC Cable L.L.C., 622 F.3d 104, 111 (2d Cir. 2010).

The First Amendment Retaliation Claim is Dismissed

To establish a violation of First Amendment speech rights, Plaintiff must establish that: (1) the speech at issue was protected; (2) he suffered an adverse employment action; and (3) there was a causal connection between the protected speech and the adverse employment action. Pearson v. Bd. of Educ., 499 F.Supp.2d 575, 588 (S.D.N.Y. 2007). Because Plaintiff is a public servant and an officer of the Civil Court of New York City, see Article 16 of the New York City Civil Court Act, §§ 1601, et seq., to establish that his speech was protected, he must demonstrate that his statements were made "as a citizen [speaking] upon matters of public concern, [and not] as an employee upon matters only of personal interest." Connick v. Myers, 461 U.S. 138, 147 (1983). First, the Court must determine whether Plaintiff was speaking "as a citizen," or whether he was acting pursuant to his official job duties.

Garcetti v. Ceballos, 547 U.S. 410, 420-22 (2006); see also Sousa v. Roque, 578 F.3d 164, 168 (2d Cir. 2009). Whether the employee spoke solely as an employee and not as a citizen is also largely a question of law for the court. Connick, 461 U.S. at 148 n.7. If Plaintiff was acting pursuant to his official duties, then he was not speaking as a citizen and his speech is not entitled to First Amendment protection. See Garcetti, 547 U.S. at 421. If, on the other hand, he was speaking as a citizen, then “[w]hether [his] speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.” Connick, 461 U.S. at 147-48.

The inquiry into whether a public employee spoke pursuant to her official duties is both objective and “a practical one.” Weintraub v. Bd. of Educ., 593 F.3d 196, 202 (2d Cir. 2010) (citing Garcetti, 547 U.S. at 424). The Circuit held that “under the First Amendment, speech can be ‘pursuant to’ a public employee’s official job duties even though it is not required by, or included in, the employee’s job description, or in response to a request by the employer.” Id. at 203. Although no single factor is dispositive, courts consider several factors when attempting to determine if a public

employee spoke pursuant to his official duties, including: (1) the plaintiff's job description; (2) the persons to whom the speech was directed; (3) whether the speech resulted from special knowledge gained through the plaintiff's employment; (4) whether the speech occurs in the workplace; and (5) whether the speech concerns the subject matter of the employee's job.

Frisenda v. Inc. Vill. of Malverne, 775 F. Supp. 2d 486, 506 (E.D.N.Y. 2011).

In the instant matter, each of the factors that courts regularly consider in determining whether public employees spoke as citizens or, rather, pursuant to their official job duties, weighs in favor of a finding that Plaintiff spoke pursuant to his job duties and not as a citizen.

First, the speech in which Plaintiff purportedly engaged falls squarely within his job description as a City Marshal and concerned the subject matter of his job. Plaintiff was actively involved in the City's Scofflaw Program and admitted that his job duties entailed the "enforce[ment] [of] parking and related fines and judgments against vehicles and their owners . . . by towing vehicles, enforcing and collecting on the unpaid fines and judgments and otherwise taking responsibility for the

care, custody and control of the vehicles.” See Compl. ¶ 21. Notably, all of the inquiries Plaintiff allegedly made concerned the Paylock Booting Program’s implementation, operation, and the effect the Program would have on the manner in which he performed his duties. Plaintiff’s alleged inquiries concerning how the Paylock Booting Program was selected, who would be in charge of tracking fines, who would supervise Paylock, what fees would be charged to vehicle owners, what the City Marshals’ new role would be under the program, what Paylock’s fee would be, and the circumstances under which a vehicle could be unbooted, all fell within the scope of his job duties, and concerned the subject matter of his job. See Weintraub, 489 F. Supp. at 221 (“[P]ublic employees who convey complaints or grievances about a matter pertaining to their official duties to their supervisors do so in their capacities as employees rather than citizens, even when the subject matter of their speech touches upon a matter of public concern, and that such speech is not protected by the First Amendment.”).

Second, the Plaintiff failed to allege the person or persons to whom he directed his speech. Compl. ¶¶ 32-36. Plaintiff has alleged in his Complaint that “after reviewing the document in the office of the DOF, [he] disseminated his

analysis and criticisms of the proposed Paylock [B]ooting [P]rogram.” Id. ¶ 35. Plaintiff has not alleged the individual or individuals to whom he conveyed his alleged “criticisms.” Id. ¶ 36. Plaintiff maintains that, throughout the remainder of 2011, he and other City Marshals continued to be outspoken about the Paylock Booting Program, and shared their critical views with other City Marshals, the Marshals’ Association of the City of New York, Inc. and with DOI. See id. at ¶ 37. However, there are no allegations that Airday’s speech was made to the public at large, to the media, to elected officials, or even to officials within DOF or DOI such as Frankel or Schwam. Airday’s complaints about the Paylock Booting Program were not expressed to anyone beyond his own colleagues, the Marshals’ Association, and unidentified individuals at DOI. These allegations support a conclusion that Airday engaged in speech as a public servant pursuant to his job duties, not as a citizen.

Third, Airday’s inquiries resulted from knowledge which he acquired through the performance of his duties as a City Marshal. The impending changes and all of his inquiries related to the impact the implementation of the program on his previous job duties were uniquely applicable to a City Marshal in the Scofflaw Program. See Frisenda, 775 F. Supp. 2d at 507

("[T]aken together, all of these undisputed facts paint a clear picture of an employee speaking out about his views regarding how best to perform his job duties, rather than of someone attempting to make a 'contribution[] to the civic discourse.'") (quoting Garcetti, 547 U.S. at 422).

In addition, there is no "civilian analog" to his speech. The Garcetti Court noted that speech by a public employee retains some possibility of First Amendment protection when it "is the kind of activity engaged in by citizens who do not work for the government," 547 U.S. at 423, "namely 'mak[ing] a public statement, discuss[ing] politics with a coworker, writ[ing] a letter to newspapers or legislators, or otherwise speak[ing] as a citizen.'" Davis v. McKinney, 518 F.3d 304, 312 (5th Cir. 2008) (quoting Spiegla v. Hull, 481 F.3d 961, 967 (7th Cir. 2007)). Here, Plaintiff's speech was allegedly conveyed exclusively to other City Marshals and unnamed individuals at DOF and DOI, and the Complaint does not allege that he directed his speech to the public at large, the media, elected officials, or even the individually named Defendants.

Since Airday's speech concerning the implementation of the Paylock Booting Program was made in his role as a public

servant, and pursuant to his official job duties, the Court need not reach the issue of whether his speech, as pled in the Complaint, related to a matter of public concern. Weintraub, 593 F.3d at 201 (explaining that, as "Weintraub's speech was not protected by the First Amendment . . . there is no cause for us to address whether it related to a 'matter of public concern'" (citing Garcetti, 547 U.S. at 421 (finding "the controlling factor" to be whether the employee-speech at issue was pursuant to official duties and declining to examine whether it related to an issue of public concern)); Frisenda, 775 F. Supp. 2d at 504 n.11 (explaining that "this Court need not address the 'matter of public concern' requirement in the instant case as it . . . because the undisputed facts demonstrate as a matter of law that plaintiff was not speaking as a citizen, but rather as an employee pursuant to his official duties, in connection with that speech"). The Complaint fails to plead facts that could demonstrate a plausible claim that he engaged in protected speech.

In his opposition, the Plaintiff has noted a distinction between independent contractor and public employee for the purposes of First Amendment analysis. See Pl.'s Mem. in Opp'n 12-13 ("[Plaintiff] was not a City employee and therefore

all the reasons for limiting the scope of a governmental employee's protected speech in the workplace do not apply."). Even assuming that Airday could be deemed an independent contractor, rather than a government employee, he is not relieved of his obligation to state a First Amendment claim that is consistent with Garcetti. A plaintiff must, in any event, plausibly plead that he was speaking as a citizen upon matters of public concern instead of as an employee or contractor pursuant to his or her official duties. See Garcetti, 547 U.S. at 421; Pickering v. Bd. of Educ., 391 U.S. 563 (1968); Connick v. Myers, 461 U.S. 138 (1983). Indeed, the same First Amendment analytical framework applies to both employees and independent contractors. See Lakner v. Lantz, 547 Fed. Appx. 13, at *6 (2d Cir. 2013); Fahs Construction Group Inc. v. Gray, 725 F.3d 289 (2d Cir. 2013) (plaintiff's claims were not akin to speech by a citizen upon matters of public concern, but rather were speech made by an employee or contractor upon matters only of personal interest). In Lakner, the Second Circuit addressed, and rejected, the argument that an independent contractor is entitled to some different level of First Amendment protection not afforded to a "traditional" government employee, finding that:

[T]he fact that Lakner's prior relationship with DOC was as an independent contractor rather than

as an employee does not alter the [First Amendment] analysis.

Although there are various differences between employees and independent contractors, these differences "can be accommodated by applying [the] existing framework for government employee cases to independent contractors.

See Lakner, 547 Fed. Appx. at *6. Thus, Plaintiff in the instant case cannot distinguish Garcetti based on Plaintiff's alleged status as an independent contractor.

Courts have applied Garcetti in the government contractor context. See, e.g., Fergus v. New York City Health and Hosp. Corp., 11 Civ. 2419 (WHP), 2011 WL 5007000, at *9 (S.D.N.Y. October 14, 2011); see also Castro v. County of Nassau, 739 F. Supp. 2d 153, 178-80, n.18 (E.D.N.Y. 2010) (It is well settled that, even though he was a contract employee, the standards for public employees also apply to individuals who work as contractors for government agencies.); Ansell v. D'Alesio, 485 F. Supp. 2d 80, 84-85 (D. Conn. 2007) (same); Decotis v. Whittemore, 635 F.3d 22, 30-35, and 36 n.16 (1st Cir. 2011).

Thus, the First Amendment analysis remains the same for independent contractors. Plaintiff must plausibly plead

that he spoke as "a citizen upon matters of public concern [rather than] as an employee or contractor upon matters of personal interest." See Fahs Construction Group Inc., 11 Civ. 2419, at *18 (WHP) (S.D.N.Y. 2012), aff'd 725 F.3d 289 (2d Cir. 2013); Weintraub v. Bd. of Educ., 489 F. Supp. 2d 209, 221 (E.D.N.Y. 2006) aff'd, 593 F.3d 196 (2d Cir. 2010). Otherwise, as is the case here, the First Amendment does not protect that speech.

Plaintiff's purported speech is not the "kind of activity engaged in by citizens who do not work for the government." See Garcetti, 547 U.S. at 423. The Complaint's allegations establish that (1) plaintiff's speech fell within his job description and concerned the subject matter of his job; (2) plaintiff's speech was communicated within the confines of his employment, colleagues, and workplace; (3) plaintiff's speech resulted from knowledge obtained through his employment; and (4) there was no civilian analogue to the purported speech. Consequently, the First Amendment claim is dismissed.

The Procedural Due Process Claim Survives in Part

The Complaint alleges a procedural due process claim with respect to both his 2012 suspension and the Defendants' failure to renew his office in 2013 premised on a protected property or, alternatively, on liberty interest with. Compl. ¶ 84-86; Pl.'s Mem. in Opp'n 18. In addressing the suspension, Defendants note that it was the Appellate Divisions of the First and Second Department of the New York State Supreme Court, rather than the Defendants, that suspended Airday. See Def.'s Mem. in Supp't 17 citing Compl. ¶ 56. Airday, analogizing to malicious prosecution claims under § 1983, responds that Schwan is responsible for "present[ing] bogus charges to a judicial body" and that the causal link between Schwan's actions and Airday's damage is therefore unbroken. Pl's Mem. in Opp'n 17 (citing Cameron v. City of New York, 598 F. 3d 50, 63-64 (2d Cir. 2010)). Plaintiff's analogy is unpersuasive in that it selects one feature of the malicious prosecution doctrine and applies it to the instant, distinguishable, due process claim. Were this a malicious prosecution claim, the Plaintiff would need to plead that the disciplinary charges were false, brought without probable cause, and that the matter was terminated in Airday's favor. See, e.g., Cameron, 598 F. 3d at 63. Instead, the Plaintiff here avers that he paid a \$7,500 fine and entered a stipulation in order to conclude the pending charges. Compl.

¶ 68. Moreover, the Complaint does not establish the Plaintiff's property or liberty interest with respect to the suspension. Public employees must be able to point to state law, a collective bargaining agreement, or some other regulation creates that a property interest for the purposes of a due process claim. See, e.g., Ciambriello v. Cnty. of Nassau, 292 F.3d 307, 314, 316 (2d Cir. 2002) (in order to have a cognizable property or liberty interest in a specific rank or position, a public employee must but only where the employee has a state law, collective bargaining agreement provision, or some other specific guarantee protecting him against demotion). Here, the Complaint does not reference a regulation, policy, agreement or law that would entitle Airday to a hearing prior to the Defendants' decision to pursue suspension proceedings with the Appellate Divisions. See Compl. ¶ 59 (only describing Schwam's suspension request as "an abuse of his power and position under state law."). The Plaintiff's briefing in opposition to the instant motion focused on the property and liberty interests associated with Airday's termination, rather than with his suspension. See, e.g., Pl.'s Mem. in Opp'n 18-19 (contending that an implied in fact contract existed which obligated Defendants to renew Airday's office). In the absence of a valid

property or liberty interest, Airday's claim with respect to the suspension is dismissed.

Conversely, the procedural due process claim with respect to the Defendants' refusal to renew his office in 2013 survives on a property interest theory. The Complaint alleges the Defendants' decision to not reappoint Airday ran contrary to "established policies and practices regarding the re-appointment of City Marshalls," which the Plaintiff characterizes as a See Compl. ¶ 71. To be sure, City Marshals are statutorily subject to five year terms, N.Y.C. Civil Court Act § 1601, and "mutual understandings and customs could not create a property interest ... when they are contrary to the express provisions of regulations and statutes." Baden v. Koch, 638 F.2d 486, 492 (2d Cir. 1980); see also Hawkins v. Steingut, 829 F.2d 317, 322 (2d Cir. 1987); Schwartz v. Mayor's Committee on the Judiciary, 816 F.2d 54 (2d Cir. 1987). Here, however, the Plaintiff alleges that the Defendants' refusal to renew his office ran "contrary to established policies and practices regarding the re-appointment of City Marshals." Compl. ¶ 71. These allegations are sufficient to demonstrate an issue of fact with respect to whether the parties shared a mutual understanding of renewal of the position following expiration.

Finally, the liberty interest theory is inapplicable here. Though the Plaintiff contends that "Airday's liberty interest in his chose profession were also violated by the . . . termination," Pl.'s Mem. in Opp'n 19, "a decision not to reemploy, standing alone, does not deprive an employee of liberty." Donato v. Plainview-Old Bethpage Cent. Sch. Dist., 96 F.3d 623, 630 (2d Cir. 1996) (citing Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 573 (1972)) (internal quotations omitted). Rather, a plaintiff must allege aggravating circumstances, such as "when the state fires an employee and publicly charges that she acted dishonestly or immorally," Donato, 96 F.3d at 630, or effectively forecloses an employee's ability to "take advantage of other employment opportunities." Roth, 408 U.S. at 573; see also Kartseva v. Dep't of State, 37 F.3d 1524, 1528 (D.C. Cir. 1994) (holding that a liberty interest may be implicated where government refusal to rehire "formally or automatically excludes" the plaintiff from other government opportunities or broadly inhibits the plaintiff from working in a chosen profession). The Complaint does not contain such aggravating circumstances. Cf. id. (where the basis for the plaintiff's discharge was the government's warning that "several significant counterintelligence concerns raised during

the conduct of background investigations and pre-employment screening conducted on [the plaintiff] by other U.S. Government agencies," which the DC Circuit held may constitute the requisite aggravating circumstances).

In sum, the procedural due process claim, based on either a property or a liberty interest theory, fails with respect to the suspension. Conversely, Plaintiff's procedural due process claim survives with respect to Defendants' decision to not renew his office in 2013.

The Substantive Due Process Claim is Dismissed

Airday asserts that his suspension and termination also constituted violations of his substantive due process rights. Compl. ¶¶ 87-90. However, "where another provision of the Constitution provides an explicit textual source of constitutional protection, a court must assess a plaintiff's claims under that explicit provision and not the more generalized notion of "substantive due process." Kia P. v. McIntyre, 235 F.3d 749, 757-58 (2d Cir. 2000) (citing Conn v. Gabbert, 526 U.S. 286, 293, 119 S.Ct. 1292, 143 L.Ed.2d 399 (1999)) (internal quotations omitted); see also Arteta v. Cnty.

of Orange, 141 F. App'x 3, 8 (2d Cir. 2005). Here, "what would serve to raise defendant's actions beyond the wrongful to the unconscionable and shocking are facts which, if proven, would constitute, in themselves, specific constitutional violations." Velez v. Levy, 401 F.3d 75, 94 (2d Cir. 2005). Specifically, Defendants' conduct with respect to Airday's post would constitute an equal protection, procedural due process, or first amendment violation. Consequently, the substantive due process claim does not survive independently of those causes of action.

The Equal Protection Claim is Dismissed

Airday has not alleged that he was singled out because of his race or gender or any other protected characteristic or suspect classification. Consequently, he has failed to allege membership in a protected class, and can only bring an equal protection claim under two theories: selective enforcement or 'class of one.' See Best v. New York City Dep't of Correction, 14 F. Supp. 3d 341, 351 (S.D.N.Y. 2014); Rankel v. Town of Somers, 999 F.Supp.2d 527, 544 (S.D.N.Y. 2014). Both selective enforcement and class of one theories require a showing that Plaintiff was treated differently from other similarly-situated individuals. Id.

Plaintiff has failed to allege that he was treated differently from similarly situated individuals. The Complaint does not contain any allegations concerning the conduct of these other City Marshals that he considers to be more serious than his own. The absence of any allegations from which one could compare Plaintiff to these "other" unidentified City Marshals, requires dismissal of the equal protection claim.

Plaintiff's class of one theory fails on several other grounds. The Supreme Court has held that there is no cause of action for a "class of one" in the government employee context. See Engquist v. Or. Dep't of Agric., 553 U.S. 591, 605 (2008). Courts within this Circuit also bar "class of one" equal protection claims brought by government contractors. Seymour's Boatyard, Inc. v. Town of Huntington, 08 Civ. 3248, 2009 WL 1514610 (E.D.N.Y. June 1, 2009); JAV Auto Center, Inc. v. Behrens, 05 Civ. 6503, 2008 WL 9392107, at *5 (S.D.N.Y. Oct. 8, 2008) ("If Plaintiffs were independent contractors providing services to the Authority, Engquist would plainly apply, because public agencies have the same need for flexibility and discretion in dealing with their contractors as they do with their employees."). Moreover, "[i]n order to succeed on a

'class of one' claim, the level of similarity between plaintiffs and the persons with whom they compare themselves must be extremely high." Neilson v. D'Angelis, 409 F.3d 100, 104 (2d Cir. 2005) (citing Purze v. Village of Winthrop Harbor, 286 F.3d 452, 455 (7th Cir. 2002)) overruled on other grounds by Appel v. Spiridon, 531 F.3d 138 (2d Cir. 2008); accord Mosdos Chofetz Chaim, Inc. v. Vill. of Wesley Hills, 815 F. Supp. 2d 679, 697 (S.D.N.Y. 2011) ("An extremely high level of similarity is required in the 'class of one' context because plaintiffs asserting those claims are attempting to prove that the government's treatment was arbitrary and irrational."). Since Plaintiff has failed to adequately identify the comparable individuals, his claim also fails to identify the extremely high level of similarity required.

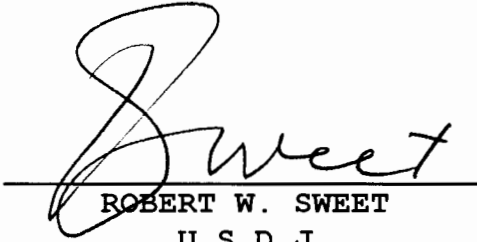
Finally, to the extent that Airday claims he was singled out because of his speech, that conduct is a part of his dismissed First Amendment claim and cannot suffice as a basis for the equal protection claim. See Mental Disability Law Clinic v. Hogan, 519 Fed. App'x 714 (2d Cir. 2013).

Conclusion

Based on the conclusions set forth above, the motion to dismiss with respect to the first amendment and equal protection claims is granted, and the motion is denied with respect to the procedural due process claim. Leave to replead within 20 days is granted.

It is so ordered.

New York, NY
September 15, 2015



ROBERT W. SWEET
U.S.D.J.